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In the

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC., a Delaware corporation; CHARTER COMMUNICATIONS PROPERTIES, LLC, a Colorado limited liability corporation; and PAUL G. ALLEN, an individual,

Petitioners,

v.

COUNTY OF SANTA CRUZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Pursuant to Rule 15.8 of the Rules of this Court, Respondent County of Santa Cruz ("County") submits this Brief in response to the Brief for the United States and the Federal Communications Commission as Amici Curiae, filed November 19, 2003.

The County heartily concurs with the Solicitor General's conclusion that "[t]he petition for writ of certiorari should be denied." (U.S. Br. 20.) As the Solicitor General concedes, in its present posture this case involves a state-law breach-of-contract dispute, rather than a review-worthy Constitutional claim. (U.S. Br. 19, n. 5; *id.* at 4 ["In our view, the First Amendment question presented in the petition does not warrant this Court's review"].) It would be improvident to grant review of a state-law breach-of-contract action bereft of Constitutional issues.[1]

The Solicitor General, however, also opines that this Court's review would not be inappropriate because the court of appeals applied a standard of review that was arguably too deferential, under which the County's action would be upheld as long as there was substantial evidence for any one sufficient reason for denial. (Pet. App. 7a.) The Solicitor General suggests that the

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[1] Nor does this case involve a claim brought directly under the Cable Act (47 U.S.C. §§ 521 *et seq.*) or a claim under the Supremacy Clause that the County's action was preempted by the terms of the Cable Act. Although Petitioners originally claimed that the County's denial of consent violated various provisions of the Cable Act, that claim was dismissed on the ground that Petitioners had no private right of action under the Act. (*Charter Communications, Inc. v. County of Santa Cruz*, 74 F.Supp.2d 937, 939 (N.D. Cal. 1999.) Petitioners chose *not* to appeal that determination. Because the Cable Act does not provide for a private right of action, Petitioners could not sue under 42 U.S.C. § 1983 for a violation of the Act, and thus no federal question is presented upon which to base federal jurisdiction.

appropriate standard of review might be a *mixed motives standard*, under which the validity of the Board of Supervisors' action would depend upon "the motivating factor" behind the Board's action as determined by a court. According to the Solicitor General, apparently it was appropriate for the district court, in order to protect the federal interests expressed in the Cable Act, to eschew the reasons for denial set forth in the Boards' Denial Resolution and to determine for itself the "real" motives behind the Board's action. Short of this, the Solicitor General warns, local franchising authorities could accomplish forbidden ends, such as imposing local technical standards, regulating rates, or requiring illegal payments to the agency because "so long as the authority identifies one plausible alternative basis for its action, that action would be upheld." (U.S. Br. 16-17.)[2]

The Solicitor General's position is without merit for several reasons. First, as conceded by Petitioners, the issue of a mixed motives standard of review was not

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[2] The Board of Supervisors' Denial Resolution sets forth a plethora of reasons why the Board denied its consent to the proposed transfer, and expert testimony established that the Board's concerns all reasonably related to Petitioners' failure to adequately establish the financial, technical, and legal qualifications of the transferee. None of the stated reasons for denial were based on Petitioners' purported refusal to agree to extend a rate freeze, to pay illegal franchise fees, or to otherwise agree to conditions illegal under the Act. Although the Solicitor General repeatedly states that the court of appeals left most of the findings of the district court unreversed (U.S. Br. 1, 12, 14, 17), the court of appeals expressly reversed and vacated the district court's judgment and decision herein, thus depriving them of all conclusive effect. (*Franklin Savings Assn. v. Office of Thrift Supervision*, 35 F.3d 1466, 1469 (10th Cir. 1994).)

raised or addressed in the district court or in the court of appeals, and was not even raised in the petition for writ of certiorari. (Pets. Supp. Br. 3, n. 3.) Thus, the Court should not consider the issue here. (Supreme Court Rules 14.1(a) ["Only the questions set out in the petition, or fairly included therein, will be considered by the Court"]; *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) [the Court has, with very rare exceptions, refused to consider a petitioner's claims not raised or addressed below].)

Second, transfer applicants would not be forced to accede to conditions that are proscribed by the Act under the deferential standard of review applied by the court of appeals. Any illegal conditions imposed on a transfer application would be subject to either a refund action or to invalidation by way of a writ of mandate or declaratory relief action. Contractual agreement does not protect otherwise unlawful conditions. (*See, e.g.*, *Williams Communications, LLC v. City of Riverside* (No. E032661, Dec. 18, 2003) __ Cal.App.4th __ (2003 DJDAR 13841) [city ordered to refund payment illegally imposed under license agreement on interchange carrier as a condition of carrier's installing fiber optic cable in city's streets].)

Third, case law does not support the Solicitor General's position. The cases cited by the Solicitor General wherein a mixed motives, two-step burden-shifting analysis was utilized were either (i) invidious discrimination/First Amendment retaliation cases *where motive was relevant under the Constitutional standard*, or (ii) cases based on alleged violations of federal statutes *that expressly provided for a mixed motives standard of review* (Title VII or the National Labor Relations Act).

Thus, in *Desert Palace, Inc. v. Costa*, 123 S.Ct.

2148 (2003) plaintiff sued her employer alleging sex discrimination under Title VII. Under Title VII, an unlawful employment practice is established when plaintiff demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors may also have motivated the practice. (42 U.S.C. § 2000e-2.) Under the express terms of the statute, however, if defendant shows it would have taken the same action in the absence of the impermissible motivating factor, a court may grant only injunctive or declaratory relief and attorneys' fees—it may not award damages, reinstatement, or promotion. (*Id.* § 2000e-5(g)(2)(B).) Thus, Title VII specifically directs courts to investigate the motives of an employer in determining whether an unlawful employment practice exists and to undertake a mixed motives, burden-shifting analysis to determine whether the employer has a partial affirmative defense to such a claim. Significantly, no similar Congressional direction or authorization exists in the Cable Act.[3]

Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) is inapposite because it concerned a claim of First Amendment retaliation which, in essence, is a content-based claim subject to heightened scrutiny.

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[3] The Cable Act provides no substantive limitations on local franchising authorities in their review of *transfer* requests and establishes no specific judicial standard for their review. The only substantive limitations imposed by the Cable Act concern franchise *renewals*, and the only standard of judicial review prescribed by the Act is a "preponderance of the evidence" standard in connection with such *renewals*. (47 U.S.C. § 546(e).) Congress could have easily provided for substantive limitations with regard to transfers and a mixed motives standard for their review had it so desired. Absent some Congressional indication to the contrary, the courts should decline to formulate a heightened standard of review in the name of protecting federal interests.

Thus, governmental motivation was directly relevant to the Constitutional standard and a burden-shifting analysis was again appropriate. Here, Petitioners have conceded that the County's actions were content-neutral, and retaliation was not alleged.

Similarly, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) involved claims of racial discrimination under the Equal Protection clause of the Fourteenth Amendment. The Court held that plaintiffs needed to show racially discriminatory intent rather than simply disproportionate impact to establish their claim. Again, motive and burden-shifting were directly relevant to this Constitutional standard. Neither racial discrimination nor any other invidious discrimination was alleged by Petitioners here.

Finally, *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) simply upheld an NLRB rule construing a statutory provision under the National Labor Relations Act allocating the burden of proof with regard to an employer's affirmative defense to a claim of unlawful discharge because of union activity. Thus, the case involved an administrative (not legislative) decision in which employer motives and burden-shifting were specifically made relevant under the terms of the statute. The Cable Act contains no similar provisions, and thus the case is inapposite.[4]

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[4] Similarly, the cases cited in Petitioners' Supplemental Brief which applied a mixed motives analysis (Pets. Supp. Br. 7, n. 8) are inapposite because they involve either (i) First Amendment *retaliation* (*North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652 (5th Cir. 1992); *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165 (1st Cir. 1995); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115 (8th Cir. 1989)); (ii) violations of the *National Labor Relations Act* (*Laro Maint. Corp. v. NLRB*, 56 F.3d 224 (D.C. Cir. 1998); *Office & Prof'l*

In all of the cases cited by the Solicitor General, motive was relevant under either the Constitutional or the statutory standard. Not so here. Petitioners did not allege retaliation because of First Amendment activity or discrimination based on a suspect classification. Rather, Petitioners simply alleged that the County breached a contract under California law by acting unreasonably in denying its consent to the transfer of the franchise. Because this case simply involves the review of a legislative act in a breach of contract context, this Court's precedents prohibit peering into legislative motivation or applying a burden-shifting analysis, as suggested by the Solicitor General. (*See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998) [whether act is legislative turns on nature of the act, not on the motive of the officials performing it; city's action bore all the hallmarks of traditional legislation because it "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents"]; *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993) [rational basis review applies to legislative acts and actual motivation for challenged action is irrelevant]; *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968).)

Finally, in arguing that a heightened standard of review of a local agency's franchising decisions is necessary to protect "federal rights," the Solicitor General paints with too broad a brush, simply assuming that the Cable Act concerns only *federal* interests. The

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Employees Int'l Union v. NLRB, 981 F.2d 76 (2d Cir. 1992)); or (iii) claims under *Title VII* (*Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187 (4th Cir. 2003). As stated, the case at bar involves none of these issues.

Solicitor General ignores the fact that the Cable Act establishes a "deliberately structured dualism" under which Congress preempted local control only in certain aspects of cable regulation (*e.g.*, technical standards and rate regulation), while leaving the *franchising* process largely to local authorities. Thus, according deference to local franchising decisions does *not* jeopardize federal interests. Rather, it promotes the Act's expressed intention that local franchising decisions be made at the local level where city officials have the best understanding of local needs and are most familiar with individual operators and franchise agreements, and thus better positioned to evaluate the effects of a proposed transfer on the community.

Furthermore, case law concerning the analogous Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("the TCA") disposes of any argument that the presence of federal interests justifies a heightened standard of review. Reflecting the dualism of the Cable Act, the TCA also constitutes "a deliberate compromise between *two competing aims*—to facilitate *nationally* the growth of wireless telephone service and to maintain substantial *local control* over siting of towers." (*Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 407 (3rd Cir. 1999), emphasis added.) Thus, the TCA also involves important federal rights and interests. However, unlike the Cable Act, the TCA also provides for a private cause of action to enforce the limitations on local control (47 U.S.C. § 332(c)(7)(B)(v)), and specifically provides that a local agency's denial of a request to construct a wireless service facility must be supported by "substantial evidence in a written record." (*Id.* § 332(c)(7)(B)(iii).)

In applying this judicial standard, courts have accorded local agency decisions the same deference that

the court of appeals accorded the County's decision in the case at bar. For example, in *Sprint Spectrum v. Charter Township of West Bloomfield*, 141 F.Supp.2d 795 (E.D. Mich. 2001), plaintiff alleged that the township violated the TCA when it denied Sprint's application for a special use permit to build a communication tower. The township gave four reasons for disapproving the application. (*Id.* at 796-797.) Quoting the Sixth Circuit, the court stated that *substantial deference* must be accorded the local agency's decision and that the court's job was merely to determine whether substantial evidence supported *any* of the stated reasons:

> The substantial-evidence standard allows considerable latitude to administrative decisionmakers. It presupposes that there is a zone of choice within which the decisionmakers can go either way, without interference by the courts. An administrative decision is not subject to reversal merely because substantial evidence would have supported an opposite decision.

(*Id.* at 799, quoting *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986).) Applying this test, the court determined that substantial evidence supported the township's first stated ground for denial (that the tower was inappropriate for the proposed location), which was enough to uphold the township's decision:

> As the Court is satisfied that the Township's first reason for denying Sprint's application was supported by substantial evidence, the Court will not discuss the Township's additional reasons for denying the permit.

(*Id.* at 802; *accord, USCOC of Virginia R.S.A. #3, Inc. v. Montgomery County*, 343 F.3d 262, 271 (4th Cir. 2003) [in upholding county's denial of application for wireless tower, the court stated: "The Supreme Court has defined 'substantial evidence' to mean 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . It includes more than a mere scintilla but less than a preponderance. . . . [W]e do not substitute our judgment for the legislature's but must uphold the decision if it has 'substantial support in the record as a whole'"].)

Moreover, like the Cable Act, which preempts certain local control of cable television, the TCA preempts certain local control in order to facilitate the national growth of the telecommunications industry. For example, local entities are prohibited from relying on concerns about radio frequency emissions to support a denial of an application to place wireless facilities so long as the emissions comply with applicable FCC regulations. (47 U.S.C. § 332(c)(7)(B)(IV).) The courts, however, have *not* held that the presence of such federal interests transforms the appropriate standard of review from the deferential substantial evidence test to a mixed motives analysis. Rather, the courts have merely held that concerns of health risks due to emissions may not constitute substantial evidence in support of a denial. (*Telespectrum, Inc. v. Public Service Comm. of Kentucky*, 227 F.3d 414, 423-424 (6th Cir. 2000).) Even when such concerns have been inappropriately included in a decision to deny an application, such inclusion was not fatal where other legitimate grounds for denial were present in the record. (*Cellular Telephone Co. v. Zoning Board*, 90 F.Supp.2d 557, 572-573 (D.N.J. 2000); *Iowa Wireless Servs. L.P. v. City of Moline*, 29 F.Supp.2d 915, 924

(C.D. Ill. 1998).)

Consequently, there is no authority for transforming the substantial evidence test or rational relationship test into a mixed motives analysis simply because federal interests may be involved in the legislative decision of a local entity. The extension of a mixed motives analysis to state contract claims which implicate federal statutory interests would constitute a frontal assault on established principles of federal-state comity and the separation of powers.

CONCLUSION

As recommended by the Solicitor General and the Federal Communications Commission, the petition for writ of certiorari should be denied. Moreover, the suggestion that the Court may wish to reframe the issues and grant the petition should be rejected for the several reasons stated herein.

Respectfully submitted,

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